FILED
OCT 2 2 2007
OFFICE OF THE CLERK
SUPREME COURT

Docket No. 06-1678

In The Supreme Court of The United States

MR. BIRGER H. UNDSETH,
Petitioner,

v.

MS. JEANIE LIA UNDSETH,
[a.k.a. Jeanie Doe, Jeanie Dalle Molle,
Jeanie Collins, Jeanie Smith,]
MS. DONNA SIMS,
MS. BARBARA MOON,
THE STATE OF GEORGIA,
THE UNITED STATES OF AMERICA,
Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR REHEARING

BIRGER H. UNDSETH
Pro Se *Petitioner*
4616 Roswell Road N.E.
Apartment K-1
Atlanta GA 30342
(404) 250-4397

TABLE OF CONTENTS

TABLE OF CONTENTS.....i

TABLE OF CITED AUTHORITIES.....i

STATEMENT OF GROUNDS..... 1

ARGUMENT..... 2

Part A. 2

Part B. 3

Sub-part I. 3

Sub-part II. 4

Sub-part III. 4

Sub-part IV. 7

Sub-part V. 7

Part C. 9

CONCLUSION..... 12

TABLE OF CITED AUTHORITIES

I. CASES

Alf v. Alf, 226 Ga. 880, 178 S.E.2d 187 (1970).....4

Briscoe v. LaHue, 460 U.S. 325 (1983).....9

Chambers v. Balt. & Ohio R.R. Co.,
207 U.S. 142 (1907).....12

Dunaway v. N.Y., 442 U.S. 200 (1979).....11

Dunson v. Dunson,
311 S.2d 189 (Fla. 1st Dist. App. 1975).....3

Eskew v. Eskew,
199 Ga. 513, 34 S.E.2d 697 (1945).....4

Johnson v. Johnson,
131 Ga. 606, 62 S.E. 1044 (1908).....4

Mathews v. Eldridge, 424 U.S. 319 (1976).....9

Maxwell v. Dow, 176 U.S. 581 (1900).....7

Mich. v. Jackson, 475 U.S. 625 (1986).....8

Moss v. Moss, 196 Ga. 340, 26 S.E.2d 628 (1943)....3

Patton v. U.S., 281 U.S. 276 (1930).....8

Perrin v. U.S., 444 U.S. 37 (1979).....11

Powell v. Ala., 287 U.S. 45 (1932).....8, 9

Rice v. Sioux City Cemetery, Inc.,
349 U.S. 70 (1955).....10

Societe Internationale v. Rogers,
357 U.S. 197 (1958).....10

Weaver v. Weaver,

238 Ga. 101, 230 S.E.2d 886 (1976).....4

Wilson v. Wilson,
277 Ga. 801, 596 S.E.2d 392 (2004)..... 3

II. RULES

11th Circuit Rule 42–4.....2

S. Ct. R. 10(a).....9

III. STATUTES

28 U.S.C. § 1915(e)(2) 2

O.C.G.A. § 19-6-1 4

O.C.G.A. § 19-9-1 4

O.C.G.A. § 19-13-4 4

IV. OTHER AUTHORITY

27A C.J.S. *Divorce* § 9 (2005)..... 3

Richard P. Shafer,
Federal Pre-Emption of State Authority over Domestic Relations-Federal Cases, 70 L. Ed. 2d 895 (1981).....7

Robert Hinde,
Modern Practice of the High Court of Chancery, Methodized and Digested in a Manner Wholly New, The
(Dublin 1786).....5, 6, 7

Webster's New Twentieth Century Dictionary Unabridged (2d ed., Simon & Schuster 1983)..... 11

STATEMENT OF GROUNDS

Petitioner's Petition for a Writ of Certiorari was denied on October 1, 2007. Petitioner submits this Petition for Rehearing on the grounds that there exists an intervening and substantial controlling effect, and substantial grounds not previously presented.

ARGUMENT

A.

Petitioner argued equity provided jurisdiction for his federal case. However, Petitioner in no way argued any relationship of equity to underlying state court proceedings involved in the case. (Pet. Cert. 26-30.) The relationship of equity to the state court proceedings, never previously presented, provides substantial grounds for rehearing. Other reasons also provide grounds for rehearing.

A concise summary of the writ petition, wherein Petitioner called upon this Court to exercise its supervisory power over the Eleventh Circuit pursuant to this Court's Rule 10(a), lays the foundation for Petitioner's grounds for rehearing.

In summary, Petitioner's writ petition showed the Eleventh Circuit sanctioned an extreme departure from the accepted and usual course of judicial proceedings by the Northern District of Georgia, Atlanta Division [hereinafter NDGa], thus validly calling for an exercise of this Court's supervisory power pursuant to Rule 10(a). Petitioner showed the Eleventh Circuit arbitrarily and capriciously denied Petitioner's right to appeal the denial of his Federal Rule of Civil Procedure [hereinafter FRCP] 60(b) motion to amend 28 U.S.C. § 1915(e)(2)

dismissal of a justiciable case he filed in the NDGa, by use of 11th Circuit Rule 42–4's "at any time" provision, similar to § 1915(e)(2)'s "at any time" provision, upon which the NDGa relied. The Eleventh Circuit's dismissal sanctioned the NDGa's wrongful dismissal, unconstitutionally destroying Petitioner's right to proceed with a valid, legitimate claim in the federal courts, which, in turn, sanctioned invidious unconstitutional destructions to, *inter alia*, marriage, parental rights, procreation, religious exercise, property and bodily integrity, not the least of which was an injury which, as recognized by substantive law, is the substantial equivalent of forced abortion, these injuries resulting from his ex-wife's alleged illicit use of a family violence Temporary Protective Order [TPO] as marital separation. (Pet. Cert. 1-30.) Furthermore, substantive law shows the TPO is both an arrest and a detention whose grievous deprivation of liberty entitled Petitioner to appointed counsel which he was never offered (Pet. Cert. 8-9, 14-17), and it is furthermore not a judicial proceeding (Pet. Cert. 10-14, 17), and it is furthermore a prejudgment attachment (Pet. Cert. 17-20), which, as recognized by substantive law, bars application of the *Rooker-Feldman* doctrine and makes Respondent Jeanie Undseth and others state actors (Pet. Cert. 17-26), thus making Petitioner's NDGa case justiciable. Thus the NDGa's denial of Petitioner's FRCP 60(b) motion was abuse of discretion. (Pet. Cert. 2-26.) Thus the Eleventh Circuit's dismissal of Petitioner's appeal was arbitrary and capricious. (Pet. Cert. 2-8, 8-26.)

Of particular note, Petitioner showed the TPO-marital-separation's constitutional defects

precluded jurisdiction to try the TPO's progeny proceedings–especially a combination no-fault/cruelty divorce with concomitant child custody and child support actions–because Georgian divorce requires a *bona fide* marital separation, and, as recognized by substantive law, unconstitutional marital separations cannot be *bona fide*. (Pet. Cert. 8-10.)

B.

I. Divorce *a vinculo matrimonii* is equitable in nature and "presents questions of purely equitable cognizance." 27A C.J.S. *Divorce* § 9 (2005); *accord Dunson v. Dunson*, 311 S.2d 189, 190 (Fla. 1st Dist. App. 1975).

Georgia law is clear "[p]roceedings for a divorce and for alimony have always, under the practice in this State, been regarded as equitable." *Moss v. Moss*, 196 Ga. 340, 26 S.E.2d 628, 632 (1943). In fact, "the superior court judge presiding over a divorce case exercises all of the traditional powers of chancellor in equity, except as otherwise provided by law." *Wilson v. Wilson*, 277 Ga. 801, 596 S.E.2d 392, 395 (2004) (quotations omitted). As Petitioner showed, in Georgia the power for a judge to award permanent or temporary child custody, or child support, is incident to the divorce proceeding, and child support is part of alimony. (Pet. Cert. 8.) Thus there is no question that the final awards of child custody and child support in the Undseth divorce are also of purely equitable cognizance.

Petitioner showed the TPO evicted Petitioner from the family residence, and awarded Respondent Jeanie Undseth sole right to the family residence, as well as child custody and child support. [R1-2-60-

61, 62 & App. A, subex. P]; *see* O.C.G.A. § 19-13-4(a)(2), (4), (6). "Alimony is an allowance out of one party's estate, made for the support of the other party when living separately. It is either temporary or permanent." O.C.G.A. § 19-6-1(a). " 'The object of alimony is the support of the children as well as the wife.' " *Eskew v. Eskew*, 199 Ga. 513, 34 S.E.2d 697, 698 (1945); (*accord* Pet. Cert. 8). Thus the TPO's marital separation, child custody and child support awards made the TPO a species of alimony. Thus the TPO was also an equity proceeding.

II. The judge was the sole trier of fact in the TPO and divorce, including their concomitant child custody and child support actions. [*See e.g.* R1-2-58, 61-62, 65, 69, 101, 115-121 & App. A, subex. P, App. B, subex. A]; (*see* Pet. Cert. 14-17, 25-26). In child custody cases Georgia law mandates that it is the *sole* discretion of the judge, "not the jury," to dispense with the issue of child custody, including all issues of fact. *Weaver v. Weaver*, 238 Ga. 101, 230 S.E.2d 886, 888 (1976); *Alf v. Alf*, 226 Ga. 880, 178 S.E.2d 187, 188 (1970); *Johnson v. Johnson*, 131 Ga. 606, 62 S.E. 1044, 1045 (1908); O.C.G.A. § 19-9-1(a)(1) (2004).

III. In traditional equity proceedings, especially those on or about 1776, well-settled equity process had long barred presiding judges–the chancellor in equity referred to in *Wilson v. Wilson*, *supra*–from arbitrating both matters of law and fact in the same case and, moreover, barred presiding judges from trying any facts of a case whatsoever. The trier of fact remained separate and distinct from the presiding judge from well before 1776 and the

presiding judge was never given power to either identify or sift through and weigh a witness's testimony. Robert Hinde, *The Modern Practice of the High Court of Chancery, Methodized and Digested in a Manner Wholly New* 313-16 (Dublin ed., 1786). The examination of witnesses was done by examiners at the Examiner's office, or by a commission. *Id.* at 316. Examiners or commissions were responsible for the original examination of witnesses, the cross examination of witnesses, "[t]he examination of witneffes [sic] *in perpetuam rei memoriam*," "[t]he examination of witneffes [sic] *de bene effe*," and "[t]he examination of witneffes [sic] *to the credit* of a witnefs [sic] already examined." *Id.* Thus the judge never examined the truth of witnesses' statements while presiding over an equity case's matters of law. In fact, a former practice discontinued well before 1776 called for the Lord Chancellor or Lord Keeper to examine witnesses after the publication of a cause (i.e., case) in equity was passed "or where at the hearing the court entertained doubts," and afterwards the witnesses' sealed depositions were delivered to the Lord Chancellor or Lord Keeper not to be published, except by special order. *Id.* (Publication was the part of equity process that brought all the facts to all the parties through the publication of witness depositions in order to effectuate that the cause was "ripe and proper to be [s]et down for hearing." *Id.* at 378, 403). This "antiquated [s]pecies of examination" was "con[s]idered as ob[s]olete, and con[s]equently out of u[s]e" by the 17th century, *id.* at 316, *ergo* at least 76 years before the *Declaration of Independence* was ratified on July 4th, 1776. Thus well-settled equity process on and about 1776

barred presiding judges from identifying, weighing, or trying witness' testimony.

Equity courts recognized that the "object" of the "work" of the examination of witnesses was to create a "compilation of practical knowledge" of the case, "with a view to elucidate the cour[s]e of the court as at pre[s]ent under[s]tood." *Id.* In other words, the examination of witnesses was effectively understood to be the sum total of the evidence of the case. This shows the facts of an equity case were brought into the equity hearing certified and pre-established, with the truth of these facts judged and substantiated *before* the hearing, and out of the presiding judge's reach in identifying, trying or weighing them. The presiding judge encountered the facts of the case only after they were pulled from contention. And, as noted, this procedure was well-settled well before the *Declaration of Independence* was ratified.

"Anciently" by 1776 the examination of witnesses used to be "before a judge of the court, who[s]e province it was to di[s]criminate between a plain con[s]i[s]tent narrative of facts" or a "[s]u[s]picious, unconnected, de[s]ultory tale." *Id.* at 314. But in chancery this examination of witnesses was originally conducted by the Master of the Rolls. *Id.* And over time the examination of witnesses was left to the Master's clerks, and through interrogatories the Master's clerks "[s]ub[s]tantiat[ed] the allegations on each [s]ide" through the examination of *all* the witnesses. Eventually the examination of all the witnesses which substantiated the allegations on each side found its way into the office of the examiners or commissioners. *Id. In 1776 the role of all this examination was to "prove the facts*

alleged by the pleadings on each [s]ide" "according to the manner of the civil law." Id. at 313-14 (emphasis added). *Ergo*, once again, it is clear that the sum total of the facts of the case consisted of the examination of witnesses, as it was the examination of witnesses that was used to prove the facts of the case. Thus it is clear that from antiquity well-settled equity process barred presiding judges from trying matters of fact in an equity proceeding.

IV. The 14th Amendment requires due process in state court proceedings. The "requirement . . . is met if the [state court] trial is had according to the settled course of judicial proceedings." *Maxwell v. Dow*, 176 U.S. 581, 595 (1900). *Ergo*, state court judicial proceedings not conducted according to a settled course violate due process.

Where state law regulating judicial proceedings conflicts with 14th Amendment due process such law "is in conflict with the supreme law of the land." *Id.* And this Court, "even in the area of domestic relations, has not hesitated to protect, under the supremacy clause, rights and expectancies established by federal law against the operation of state law." Richard P. Shafer, *Federal Pre-Emption of State Authority over Domestic Relations-Federal Cases*, 70 L. Ed. 2d 895, 898 (1981).

V. Because presiding judges arbitrated both fact and law in the instant TPO, divorce, and their concomitant child custody and child support actions, due process was violated:

> One test which has been applied to determine whether due process of law has been

> accorded in given instances is to ascertain what were the settled usages and modes of proceeding under the common and statute law of England before the Declaration of Independence, subject, however, to the qualification that they be shown not to have been unsuited to the civil and political conditions of our ancestors by having been followed in this country after it became a nation.

Powell v. Ala., 287 U.S. 45, 65 (1932) (citations omitted).

Because well-settled English equity process from antiquity barred the presiding judge from arbitrating both matters of fact and law, pp. 4-7 *supra*, *Powell* shows the proceedings in question were not conducted according to a settled course.

Moreover, reiterating, the TPO's deprivation of physical liberty entitled Petitioner to appointed counsel which Petitioner was never offered. (Pet. Cert. 14-17.) Thus counsel needed to be present at every critical stage of the TPO proceeding–e.g., the non-*ex-parte* hearing–which right Petitioner could not waive by lack of affirmative request. *See Mich. v. Jackson*, 475 U.S. 625, 633 & n. 6 (1986). Further, waiver of the right to a separate trier of fact in the TPO (or any of its equitable progeny) required "express and intelligent consent." *See Patton v. U.S.*, 281 U.S. 276, 312-13 (1930) (regarding jury trial). However, the law presumes there is no express and intelligent consent where right to counsel is denied. *See Powell*, 287 U.S. at 68-69. Thus Petitioner did not waive the right to a separate trier of fact in the TPO. (*Accord* Pet. Cert. 14-17.) Thus the proceeding's course remains

unsettled.

Moreover, because the purpose of separating the arbitration of fact and law preserved the truth-finding process, *see* pp. 6-7 *supra*, barring presiding equity judges from arbitrating both fact and law is not unsuited to the civil and political conditions of our ancestors. *Briscoe v. LaHue*, 460 U.S. 325, 335 (1983) (" 'It is precisely the function of a judicial proceeding to determine where the truth lies.' "); *Mathews v. Eldridge*, 424 U.S. 319, 344 (1976) ("[P]rocedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases . . . ."); *cf. Powell*, 287 U.S. at 68-69 (denial of right to counsel obfuscates the truth-finding process ultimately resulting in "a denial of the hearing").

Thus the TPO-marital-separation violated due process, as did the divorce, as did their child custody and child support (i.e., alimony) orders. Thus Petitioner shows previously unpresented grounds authorizing rehearing.

Additionally, this due process violation again bars the TPO from being a *bona fide* marital separation, thus again precluding jurisdiction for any of its progeny. Pp. 2-3 *supra*.

C.

While the review on a writ of certiorari is discretionary, and broad, S. Ct. R. 10(a), it is not absolute. When deciding to exercise certiorari jurisdiction it is "the Court's duty to avoid decision of constitutional issues unless avoidance becomes evasion." Where the issues involved are "[s]pecial and important," and "especially . . . where the issues involved reach constitutional dimensions,"

they indicate the point where avoidance becomes evasion. *Rice v. Sioux City Cemetery, Inc.*, 349 U.S. 70, 73-74 (1955) (quotations omitted).

Rule 10 exists to lighten the Court's workload. *See id.* (commenting on the Judiciary Act of 1925 and creation of the federal appeals courts). However, the Court has recognized that "there are constitutional limits upon the powers of the courts, *even in aid of their own valid processes*, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause." *Societe Internationale v. Rogers*, 357 U.S. 197, 209 (1958) (regarding FRCP 37) (emphasis added).

Thus *Rice* shows the Court is able to breach its discretion, while *Societe* proves a principle of right and justice the Court can easily apply to itself, namely that if the Court breaches its discretion when denying a petition for a writ of certiorari, Rule 10 cannot sustain the denial. Instead the petitioner should be afforded the opportunity to present his or her cause to the Court on the merits.

Petitioner's Petition for a Writ of Certiorari fulfills *Rice*'s requirements. Petitioner shows at least two special and important issues that reach constitutional breadth: (1) the lower courts sanctioned unconstitutional unilateral spousal destruction to, *inter alia*, Petitioner's constitutionally protected fundamental right to raise his child, an injury recognized to be the substantial equivalent of forced abortion (Pet. Cert. 8-10, 10-26); (2) Petitioner's injuries were accomplished by an arrest and detention whose deprivation of physical liberty necessitated appointed counsel in the state courts, in a proceeding that was decidedly *not* judicial, thus

barring application of *Rooker-Feldman*, thus mandating the NDGa to try the case, thus barring the 11th Circuit's "at any time" dismissal (Pet. Cert. 2-8, 10-26); *see also Dunaway v. N.Y.*, 442 U.S. 200, 213 (1979) (" 'strong reason to suspect' " not sufficient to establish probable cause for arrest warrant).

Petitioner was very clear that, pursuant to Rule 10(a), he petitioned the Court to exercise its "supervisory power" over the lower courts in order to "protect the integrity of the federal system." (*E.g.* Pet. Cert. 2-8, 30-31 (quotations omitted)). "Supervise" means "to oversee or direct work." *Webster's New Twentieth Century Dictionary Unabridged* 1831 (2d ed., Simon & Schuster 1983). Thus Rule 10(a)'s phrase "supervisory power" requires the Court to oversee and direct the work of the lower courts. *See Perrin v. U.S.*, 444 U.S. 37, 42 (1979) ("A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." (citation omitted)). Thus Rule 10(a) largely obviates the Court's duty to avoid constitutional decisions where the Court is required to supervise the lower federal courts. Indeed, how can the Court oversee and direct the work of the lower courts if the Court ignores the unconstitutionality of their acts? In the instant case the Court had a duty to oversee the abuses of the lower courts, which it clearly evaded by denying Petitioner's Petition for a Writ of Certiorari. Thus the Court breached its discretion and ruled outside its range of choice, thereby creating an intervening substantial controlling effect authorizing rehearing.

The Court's breach of discretion is no small matter. The 11th Circuit sanctioned the bar of a perfectly legitimate, justiciable case by the NDGa. If in the instant case this Court continues to evade its duty to oversee the courts below, this Court will have done nothing other than sanction the 11th Circuit's and NDGa's precedent of dismissing legitimate federal cases. As this Court knows: "The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship." *Chambers v. Balt. & Ohio R.R. Co.*, 207 U.S. 142, 148 (1907). In light of *Chambers*, can this Court really afford to continue to sanction a precedent that unlawfully bars rightful access to the federal courts? Or is it true that in America justice is dead?

CONCLUSION

The Petition for Rehearing should be granted.

Respectfully submitted,

Birger H. Undseth
Pro Se *Petitioner*
4616 Roswell Road N.E.
Apartment K-1
Atlanta GA 30342
(404) 250-4397

November 2007.

(Rule 44(2) Certificate follows on next page)

RULE 44(2) CERTIFICATION

Pursuant to Supreme Court Rule 44(2), Petitioner hereby certifies:

(1) that this Petition for Rehearing is restricted to the grounds specified in Rule 44(2), and

(2) that this Petition for Rehearing is submitted in good faith and not for the purpose of delay.

_____

Birger H. Undseth
Pro Se *Petitioner*